No. 72-851

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ALSO KNOWN AS THE ONEIDA INDIANS OF NEW YORK, AND THE ONEIDA INDIAN NATION OF WISCONSIN, ALSO KNOWN AS THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., PETITIONERS

v.

THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14–29) is reported at 464 F. 2d 916. That court's denial of a petition for rehearing and suggestion of rehearing *en banc* (Pet. App. 30) is not officially reported. The opinion of the United States District Court for the Northern District of New York (Pet. App. 31–41) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1972. Petitioners' motion for rehearing was denied on September 11, 1972. The petition for a writ of certiorari was filed on December 9, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether claims by Indian tribes to the ownership of land, relying on three treaties and the Non-Intercourse Act of 1790, were properly dismissed for want of jurisdiction under 28 U.S.C. 1362 because of the "well pleaded complaint" rule.

STATUTES AND TREATIES INVOLVED

The Non-Intercourse Act of 1790, 1 Stat. 137, now 25 U.S.C. 177, provides in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

* * * * *

28 U.S.C. 1331(a) reads as follows:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

80 Stat. 880, 28 U.S.C. 1362, provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Article II of the Treaty of Fort Stanwix, dated October 22, 1784, 7 Stat. 15, provides:

> The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Article 3 of the Treaty of Fort Harmar, dated January 9, 1789, 7 Stat. 34, provides:

> The Oneida and Tuscarora nations are also again secured and confirmed in the possession of their respective lands.

Articles II and VII of the Treaty with the Six Nations, dated November 11, 1794, 7 Stat. 45–46, provide:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.
>
> * * * * *

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendant by him appointed: and by the Superintendant, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

STATEMENT

This brief is submitted in response to the Court's order of February 20, 1973, inviting the Solicitor General to express the views of the United States in this case.

Petitioners, two Indian Nations, filed a complaint in the United States District Court for the Northern District of New York challenging a 1795 sale of tribal

lands, allegedly in violation of Indian treaties between the United States and the Oneidas and five other tribes known as the Six Nations, confirming their right to possession, and the Indian Non-Intercourse Act of 1790 (now 25 U.S.C. 177). The Oneidas demanded recognition of their ownership of these lands and payment for their fair rental value to the extent of at least $10,000. The district court dismissed the complaint for lack of jurisdiction, and this was affirmed by a divided panel of the Second Circuit.

DISCUSSION

The court of appeals considered three asserted bases of federal jurisdiction and rejected all of them. These were (1) the existence of a federal question, (2) diversity of citizenship, and (3) the Civil Rights Act, 42 U.S.C. 1983, and 28 U.S.C. 1343(3). In this memorandum, attention will be limited to the first of these, namely, the existence of a federal question. This turns on the question whether the "well pleaded complaint" rule applies to the claims stated in the complaint filed in this case.

1. Insofar as ordinary claims are concerned, it is long and well established that the "well pleaded complaint" rule is applicable in determining the existence of a federal question under the general federal question statute, 28 U.S.C. 1331. Thus, it is established that a complaint in an action basically in ejectment presents no federal question even though a plaintiff's claim or right of title is founded on a federal statute, patent or treaty. *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 201; *Taylor* v. *Anderson*, 234 U.S. 74; and other cases cited in the opinion below at Pet. App. 19.

2. In 1958, Section 1331 was amended. The only change made was to increase the jurisdictional amount from $3,000 to $10,000. Public Law 85–554, 72 Stat. 415. There is nothing, either in the statutory provision, or in its legislative history, to indicate that Congress was dissatisfied with the "well pleaded complaint" rule. The language of the statute was reenacted without change, except for the increase in the jurisdictional amount.

Apparently the increase in the jurisdictional amount caused difficulties with respect to certain Indian land claims. As a result, in 1966 Congress enacted Public Law 89–635, 80 Stat. 880, which added 28 U.S.C. 1362 to the Code. This is the provision under which the present case is brought. The language of this section is identical with that in Section 1331, except that it removes the jurisdictional amount requirement with respect to "all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

The present suit comes within this statute. The statute makes no reference, direct or indirect, to the "well pleaded complaint" rule. The question here, then, is whether Congress repealed that rule when it used in Section 1362 the identical language with respect to "jurisdiction of all civil actions * * * aris[ing] under * * *" which it had long used in Section 1331.

3. This is a technical question of statutory construction and of federal jurisdiction and procedure. It is not an easy question. In last analysis, it probably turns on whether the statute should be construed

broadly and loosely (in the sense that it would be construed to achieve a result not stated or adverted to by Congress) because it is a statute involving Indian claims, or whether it should be construed more precisely and narrowly because it is a statute involving federal jurisdiction. Putting the same question another way, the question is whether the language used in Section 1362 should be construed to repeal the "well pleaded complaint" rule when Congress said nothing to that end, and when the identical language in Section 1331 does embody the "well pleaded complaint" rule pursuant to long established decisions of this Court.

4. There is legislative history which is relevant, though inconclusive. This is found in S. Rep. No. 1507, 89th Congress, 2d Session, dated August 24, 1966. This report states that:

> The purpose of the bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the $10,000 limitation, and accordingly amends chapter 85, title 28, United States Code, by adding a new section.

There is nothing in this which relates to the "well pleaded complaint" rule. The sole purpose stated is that the Bill will repeal the $10,000 jurisdictional amount.

The report then states that—

> * * * the jurisdictional limitation works an especial hardship on Indian tribes. In many instances claims arise under special treaties between the United States and the tribes, but

> because of the limitation the matter cannot be litigated in Federal courts. * * *

The report does include a reference to "parcels of land" (in a context of jurisdictional amount), and a letter from the Interior Department printed at the close of the report refers to "litigation involving tribal lands," again in connection with the proposal to remove the jurisdictional amount requirement. A letter from the Department of Justice, also printed at the close of the report, says that "the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States * * *." But, again, there is no reference to the "well pleaded complaint" rule, and the thrust of the letter is solely on the matter of eliminating the $10,000 jurisdictional amount.[1]

The report concludes by saying that "The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys." This language, standing alone, might seem to indicate that Congress was intending to enact a broad general statute authorizing the Indians to bring suit in the federal courts, without regard to any restrictions. However, the only restriction referred to in the statute, or clearly in the legislative history, is the jurisdictional amount.[2]

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[1] The House report is essentially the same. H. Rep. No. 2040, 89th Congress, 2d Session. The hearings were not printed. We have located a typed copy, and this is being lodged with the Clerk.

[2] In their supplemental petition, the petitioners contend, in effect, that there is a conflict with the decision of the Court of

5. Repealing the "well pleaded complaint" rule with respect to Indian claims would be a major step which should not be lightly imputed to Congress. Although the present claim involves only two parcels of land, the jurisdictional decision would be applicable to large areas of land in upstate New York, as well as other areas. Congress has already acted on the general problems by adopting the Indian Claims Act. The claims available there are different from those raised here, which are against private parties; but if there is to be relief on a broader scale, the question should be fully considered by Congress and Congress should make the policy determination. It is clearly within the power of Congress, and Congress has made no explicit change in the "well pleaded complaint" rule in more than 100 years. Nor has Congress given the federal courts general jurisdiction over Indian claims except in terms of

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Appeals for the Ninth Circuit in *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555. However, that was "a trespass and quiet-title action." 269 F. 2d at 556. It was brought under 28 U.S.C. 1331. It may be that the "well pleaded complaint" rule could have been raised, but no question was raised on that issue, presumably because it was thought inapplicable in such a suit. The court of appeals held that there was jurisdiction under Section 1331, but it did not deal with or pass upon the issue involved in this case. Thus, there is no conflict of decision in the courts of appeals.

There is, however, a conflict with the decision of the District Court for the District of Arizona in *Salt River Pima-Maricopa Indian Community* v. *Arizona Sand and Rock Co.* See supplemental petition 2–3. In that decision Judge Murray referred to the opinion below, and refused to follow it. This, however, does not represent a conflict between the courts of appeals.

a federal jurisdiction requirement, which, historically, incorporates the "well pleaded complaint" rule.[3]

6. The Oneida Tribe has filed a claim under the Indian Claims Act, and this case is now pending before the Indian Claims Commission, and is being defended by the Department of Justice. In that sense, there is a conflict of interest, which should be disclosed. However to the extent that this case is a federal jurisdiction case, the conflict of interest is not very relevant. The Court has asked the Solicitor General to state his view. He concludes, not without difficulty, that the decision below is correct, and that certiorari should be denied.

7. This view is not shared by all government lawyers, either within or outside the Department of Justice. Some lawyers view this as essentially an Indian case, rather than a federal jurisdiction case. They find in the legislative history general support for the claims of Indians, above and beyond anything actually stated by Congress.

In particular, the Acting Solicitor of the Department of Interior, under date of March 21, 1973, has

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[3] It is contended by the *amicus curiae* (Native American Rights Fund Br. 3) that no remedy is available to the petitioners in the state courts. The court below did not pass on this, simply raising the question whether there was any such lack of jurisdiction in the state courts. (See opinion below, Pet. App. 25, n. 9.)

The contention that the state courts have no jurisdiction is based on 25 U.S.C. 233, enacted in 1950, which provides that "nothing herein contained" shall give the state courts jurisdiction of such claims. It does not follow, however, that the state courts do not have jurisdiction apart from this statute. The question appears to be an open one in the state courts.

written to state his "reasons why we think the United States should recommend that certiorari be granted," and has asked that his views be made known to the Court. His letter continues as follows:

> To us the significance of the *Oneida* case is the interpretation which should be accorded to 28 U.S.C. § 1362. By two-to-one decision, the Second Circuit has concluded that the "well-pleaded complaint rule" developed as a result of interpreting 28 U.S.C. § 1331 must also be applied to § 1362.
>
> We think the legislative history of § 1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. As both the petitioners and the Native American Rights Fund as *amicus curiae* point out respectively in their petition and brief, unless the Federal courts have jurisdiction of such a claim as presented by the Oneidas it may not be litigated since state courts have no jurisdiction to try suits involving rights to Indian lands.
>
> Indicative of the Congress' intent that all Indian land cases may be litigated by Federally recognized Indian tribes in Federal courts pursuant to § 1362 is the following portion of the statement contained in Senate Report No. 1507, 89th Congress, 2nd Session, reporting on S. 1356, which became § 1362. The portion of the statement to which we refer appears on page 2 of Report No. 1507 and reads as follows:
>
> "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have

had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

The present case classically illustrates an instance of what the Senate Judiciary Committee had in mind, for the suit is brought by tribal attorneys since the United States, which is defending against an Oneida claim filed pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* involving aspects of the claim being pursued by the Oneida Nation against Oneida and Madison County, declined to file an action on behalf of the Nation.

I shall appreciate your bringing the foregoing views of the Department of the Interior to the attention of the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1973.

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